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2006 SEP 22 AM 9 49

KIM F. ELLISON
EX CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

**STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT**

IN THE MATTER OF THE
DETERMINATION OF THE RIGHTS
TO THE USE OF THE SURFACE
WATERS OF THE YAKIMA RIVER
DRAINAGE BASIN, IN
ACCORDANCE WITH THE
PROVISIONS OF CHAPTER 90.03,
REVISED CODE OF WASHINGTON,

NO. 77-2-01484-5

DEPARTMENT OF ECOLOGY'S
MEMORANDUM ON ISSUES
REGARDING FINAL DECREE

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendant.

Pursuant to this Court's direction in open court on July 13, 2006, the Department of Ecology, by and through its attorney, Barbara A. Markham, Assistant Attorney General, files this memorandum proposing issues to be addressed prior to entry of a final decree in this adjudication.

I. PUTTING TOGETHER THE FINAL DECREE

The Conditional Final Orders entered in this adjudication have generally incorporated, by reference, previous reports or orders entered as to a particular subbasin, major claimant, or other pathway. Someone wishing to know about the right conditionally confirmed for a particular

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1 claimant would have to review all documents listed in the CFO in order to determine the specific
2 elements of a water right as determined by the Court.

3 Ecology considered the suggestions of other counsel and agrees that having each water
4 right listed in the final decree would provide a more convenient reference to the specific elements
5 of each right. The format would be familiar and generally consistent with the schedule of rights in a
6 Report of Referee.

7 Each right included will have a certificate number, and, if applicable, a subbasin number
8 for ease of reference. Ecology proposes each right include the date of the CFO in which the right
9 was determined. County parcel information, required for recording with the county auditors, will
10 be included on the certificates. Ecology is investigating ways to incorporate this information into
11 its data base. In addition, Ecology suggests conditions or limitations applicable to rights, such as
12 metering, be included in the Final Decree and be referenced in the schedule of rights. These
13 conditions or limitations might be generally applicable or might be specific to a particular right.

14 The Final Decree should incorporate generally-applicable language that this is a quiet title
15 action to all surface water rights in the Yakima River Basin, and that no valid surface water rights
16 exist in the Yakima River Basin except as set forth in the Final Decree.

17 Ecology proposes the Final Decree should also explain how priorities will be regulated as
18 among different streams and tributaries within the watershed. No junior user should be shut off
19 because both the junior user and a senior user are taking water from two different streams above
20 the confluence of the two streams. A provision of this sort was included in the Beaver Creek
21 Decree, *State of Washington v. Thurlow*, Superior Court for Okanogan County, Washington, No.
22 3935 (September 20, 1921). In section 5, the Decree included this provision on how rights would
23 be satisfied:

24 That the classification hereinabove set forth is subject to the following
25 qualification: As between claimants diverting water from Beaver Creek above the
26 confluence with Frazer Creek and claimants diverting from Frazer Creek, claimants
diverting from Frazer Creek are entitled to divert water from said Creek although
prior rights of diverters from Beaver Creek above its confluence with Frazer Creek

1 do not receive all the water to which they are entitled. Claimants diverting from
2 Frazer Creek, however, are not entitled to divert waters from Frazer Creek until
prior rights diverting from Beaver Creek below its confluence with Frazer Creek
have received water to which they are entitled.

3 This sort of provision is not part of the futile call doctrine, which the Court of Appeals
4 recently held does not apply in the State of Washington. *Fort v. Ecology*, 133 Wash. App. 90, 98-
5 99, 135 P.3d 515 (2006). In other states, the futile call doctrine applies generally in the example
6 given by the Court of Appeals, when a senior and junior user are both on the same stream, but the
7 stream will be dry at the senior user's point of diversion regardless of whether the junior user takes
8 water. Ecology requests that the Court provide for regulation of the streams when the junior and
9 senior users are on different streams.

10 **II. ESTIMATED TIME TO PREPARE INFORMATION FOR FINAL DECREE**

11 Ecology has already completed the process of integrating information from rulings as to
12 rights for all Subbasin CFOs entered to date except for Subbasins 9 and 27. Although this work
13 has not yet been initiated for the other pathways, Ecology expects to initiate a similar process for
14 integrating information for water rights confirmed in the Federal Reserved-Non Indian, Federal
15 Reserved-Indian, and Major Claimant pathways.

16 Ecology estimates it generally takes six months to integrate the information for each
17 subbasin once the CFO is entered. With existing staffing levels, Ecology estimates it could
18 complete preparation of final decree information for the remaining subbasins and other pathways in
19 about two years from now if the remaining subbasin CFOs are issued in a series with a sufficient
20 period of time between them.¹

21 **III. SERVICE OF FINAL DECREE**

22 Ecology proposes that it mail a Notice of Availability and include it in the monthly notice,
23 informing persons that a copy of the Final Decree is available on Ecology's website or by mail by
24

25 ¹ Ecology is consulting with the Yakima Adjudication Office about the work that must be done on the
26 other pathways.

1 request to Ecology. This procedure would be similar to that set forth in the Order Amending
2 Pretrial Order Nos. 5 and 8, (May 14, 1992).

3 **IV. PREPARATION OF CERTIFICATES AND ESTIMATED TIME**

4 Ecology expects that preparation of the certificates will require approximately 12 months,
5 depending on the number of requests for division of water rights.

6 **V. FEES FOR CERTIFICATES**

7 Ecology is required, pursuant to RCW 90.03.470(10), to charge a fee for preparing and
8 issuing each certificate, and is required, pursuant to RCW 90.03.330(1), to file (at the expense of
9 the party receiving the certificate) a copy of the certificate with the county auditor(s). Ecology may
10 not issue certificates unless the required fees are paid in full. RCW 90.03.470(13).

11 Ecology requests the Court order, as part of the final decree that, for each water right
12 certificate issued, payment of all required fees be submitted to Ecology within 180 days of
13 receiving request for payment from Ecology.

14 **VI. ASSURING THAT OWNERSHIP INFORMATION IS CURRENT**

15 The Court has ordered that all claimants inform the Court and other parties in writing of
16 address changes, changes in ownership, and other changes. Pretrial Order No. 3. A reminder that
17 this is an obligation of the claimants is published periodically in the Monthly Notice. Ecology
18 lacks the resources to independently research current ownership information for each water right.

19 **VII. DEFAULTING PARTIES**

20 In past adjudications, Ecology has filed a motion to default parties who have not appeared.
21 While Ecology expects to file such a motion in this adjudication after the last CFO is entered, the
22 process for filing such a motion became more complex following an amendment to CR 55 several
23 years after this adjudication began. The rule now requires that if the motion to default is made
24 more than one year after initial service of process, the defaulting parties or their attorneys must be
25 provided with notice of the motion for default by personal service, mail service, or publication and
26 mailing to the last known address. CR 55(f).

1 Ecology estimates that nearly 6,000 persons (some associated with the same address such
2 as husband and wife) may be in default. The address information on these persons is generally
3 decades old. In addition, many mailing addresses at the beginning of this case were in terms of
4 rural route numbers, and those have since been replaced with street/road names and house
5 numbers. Ecology contacted the Postmaster General's Office (USPS) for the State of Washington
6 and learned they are unable to deliver mail to old rural routes and have no means to link current
7 addresses to old addresses. Ecology has tested locating addresses for a sample of about 186
8 persons in default by searching parcel records acquired from Yakima, Benton, and Kittitas
9 Counties, and has succeeded in obtaining 50 addresses (27 percent). An internet address search
10 test proved even less successful.

11 These efforts suggest that attempting service by mail or personal service would be both
12 unsuccessful and costly as to most of the parties in default. At the time Ecology is ready to move
13 for default judgment on these parties, it will update the Court on the methods it is using to locate
14 them. Ecology may propose at that time to provide notice of default to persons it cannot locate
15 through newspaper publication, as provided for in CR55(f), in Benton, Kittitas, Klickitat, and
16 Yakima Counties, or for other relief from the effects of CR55(f).

17 **VIII. REGULATION AFTER ADJUDICATION**

18 Ecology invites parties to identify areas within the adjudicated area that may need stream
19 patrollers. Ecology can then begin to plan how these stream patrollers may be added.

20 **IX. CONTINUING JURISDICTION**

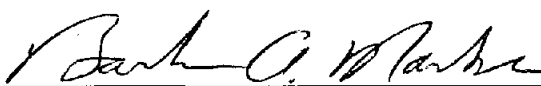
21 Ecology requests that the Court consider whether it will retain continuing jurisdiction over
22 the case after the Final Decree is entered, and, if so, for what issues it will retain continuing
23 jurisdiction.
24
25
26

1 For rights that have not gone through a change or transfer pursuant to 90.03.380 after the
2 date of the CFO, the right should be considered determined as of the date of the CFO. Ecology is
3 required to do a tentative determination of extent and validity when it processes such a change or
4 transfer. RCW 90.03.380; *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947
5 P.2d 732 (1997). Ecology is not required to do such a determination when ownership of a water
6 right changes or a water right is divided. Therefore, even if this Court has approved a motion to
7 change ownership or divide a water right subsequent to the CFO being entered for that right, the
8 effective date of the determination of the extent and validity of the right should remain the date of
9 the CFO, not the date of the approval of the subsequent motion. It would be appropriate to include
10 a disclaimer to that effect in future orders for the division of water rights or changes in ownership,
11 although a general order to that effect should clearly apply to orders of those types that have
12 already been entered.

13 Ecology will address other issues as we move forward with discussions and input from
14 other parties. Ecology looks forward to suggestions from the Court and other parties, and working
15 together in forming the final decree document.

16 Respectfully submitted this 21st day of September, 2006.

17 ROB McKENNA
18 Attorney General

19 
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